No. 02-216

SEP 11 2002

In The

Supreme Court of the United States

WORTH A. SALLEE, SANDRA M. SALLEE and JOHN WILSON, Trustee,

Petitioners,

v.

FORT KNOX NATIONAL BANK, N.A. and DICKINSON FINANCIAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the issues framed by petition are more accurately stated as follows:

1. Did the Sixth Circuit misapply the doctrine of election of remedies under Kentucky law?

2. Did plaintiffs/petitioners present sufficient evidence to establish a fiduciary duty between a bank and its borrowers under Kentucky law?

PARTIES TO THE PROCEEDING

The named respondents to this case are Fort Knox National Bank, N.A. and Dickinson Financial Corporation.

RULE 29.6 STATEMENT

Respondents Fort Knox National Bank, N.A. and Dickinson Financial Corporation have no parent or non-wholly owned subsidiary corporations.

STATEMENT OF THE CASE

Respondents Fort Knox National Bank, N.A. ("FKNB") and Dickinson Financial Corporation ("DFC") incorporate by reference the procedural and factual background sections in the opinion of the Sixth Circuit Court of Appeals. Pet. App. B at 5a-16a. Respondents also set forth the following facts that have particular significance to the certiorari petition:

This case was initially filed in state court and would have remained there had the petitioners not filed bankruptcy. Because of their bankruptcy, this case was tried to a bankruptcy court applying Kentucky substantive law.

The Bankruptcy Court entered judgment in favor of petitioners Worth and Sallee and against FKNB on breach of fiduciary duty and fraud claims arising out of a loan on which the Sallees defaulted. The court awarded the Sallees $1,719,999.00 in compensatory damages and $1,289,999.00, or 75% of the compensatory damages, as punitive damages. Pet. App. D at 121a.

The Sixth Circuit reversed the judgment in favor of the Sallees on the breach of fiduciary duty claim based on insufficient evidence, even in light of the trial court's factual findings, to impose a fiduciary duty on a lender-borrower relationship that typically imparts no such duty. Specifically, the Sixth Circuit held that "[w]hile the Sallees may have been childlike in trusting Fort Knox Bank's representatives, we find no reasonable person in their position would believe Fort Knox acted on the Sallee's behalf in lending monies to the Sallees." Pet. App. B at 3a-4a.

The Sixth Circuit affirmed the Bankruptcy Court's judgment in favor of the Sallees on their fraud claim but found that under the doctrine of election of remedies the Sallees were not entitled to receive damages for both fraudulent misrepresentation and fraudulent inducement, and reduced the damages accordingly. Pet. App. B at 4a-5a.

REASONS FOR DENYING THE WRIT

The Petition states no compelling reason sufficient to grant a petition for a writ of certiorari. To the contrary, the

error complained of in the Petition consists of an alleged misapplication of a properly stated rule of law, which under Supreme Court Rule 10 is "rarely" the basis for granting a writ.

Because this case presents no significant conflict within the Circuits, and because review of an abuse of discretion or against the weight of the evidence case is not sufficiently important to merit the Court's consideration, the Petition should be denied.

I. The Sixth Circuit Properly Stated and Applied the Doctrine of Election of Remedies Under the Substantive Law of Kentucky

Petitioners rely on the general precept that there should be a remedy for every wrong. Neither Respondents nor the Sixth Circuit challenged this general precept. Instead, the Sixth Circuit properly applied Kentucky law concerning the doctrine of election of remedies.

> Under Kentucky law, "one claiming to have been defrauded into making a contract has an option either to disaffirm the contract and seek its rescission or to affirm the contract and seek his remedy by an action for damages; he may not follow inconsistent remedies. He has but one election, and if he affirms the contract, his election is irrevocable and he condones the fraud."

Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993) (quoting *Hampton v. Suter*, 330 S.W.2d 402, 406 (Ky. 1959) (citations omitted)). Under Kentucky law, the Sallees "condone[d] the fraud" by affirming the contract. *Sanford Constr. Co., Inc. v. S&H Contractors, Inc.*, 443 S.W.2d 227, 236 (Ky. 1969) (citing *Hampton*, 330 S.W.2d at 406).

Thus, even if the Sallees are correct in now arguing for the first time that they were "defrauded in two ways" (Pet. at 8) *i.e.*, they condoned one of the frauds and recovered significant monetary damages for the other, the general precept that a recovery is available for every wrong does not negate the doctrine of election of remedies. The result of the

Sixth Circuit decision plainly allows a remedy. Here the Sallees are entitled to $421,000.00 of actual damages plus a recalculation of punitive damages. The Sallees have not been deprived of a remedy.

The Sallees make the not-so-subtle suggestion that because there were no former Kentucky law practitioners on the Sixth Circuit panel, it somehow misapplied Kentucky law. As shown above, this suggestion is wrong. Even if it somehow had merit, it does not establish any real reason for granting the writ. The Sallees are entitled to federal judges who have been appointed by the President with the advice and consent of the Senate. This is what they received. There is no right – real or imagined – to geographic representation on a particular appellate panel. Indeed, given the national scope of commerce in this country, federal judges regularly interpret state law from jurisdictions other than where they reside.

Further, as the Sallees are forced to admit, the doctrine of election of remedies is not the only basis supporting the Sixth Circuit's decision. The Sixth Circuit also found that the Bankruptcy Court's damage calculation on the fraud claim conflicted with the federal tax code. The petitioners themselves had previously disqualified their ESOP stock from rollover status by twice pledging the same ESOP stock as collateral to another bank. Pet. App. B at 36a-37a. These earlier transactions thus prevented a valid rollover to an IRA because they were a deemed distribution under 26 U.S.C. § 402(c)4. This alternative holding moots the Sallees' attack on the doctrine of election of remedies.

II. The Sixth Circuit's Holding on the Fiduciary Duty Claim Does Not Create a Conflict Within the Circuits

The Sallees' second question seeks review of the Sixth Circuit's reversal of the bankruptcy court's imposition of a fiduciary duty on FKNB to the Sallees as part of their bank-borrower relationship. The Sallees claim both that the Sixth Circuit refused the Sallees a remedy for a

recognized cause of action under Kentucky law and that the Sixth Circuit somehow created a conflict within the circuits. Neither assertion has merit.

First, the Sixth Circuit did not deny a remedy for a recognized cause of action. Contrary to the suggestion of the Petitioners, the Sixth Circuit did not deny that Kentucky law permits a fiduciary duty to exist in a bank-borrower relationship – it simply found that the Sallees' childlike trust in their bank officer did not present sufficient evidence to impose such a duty here. Pet. App. B at 17a-24a. Particularly important to the Sixth Circuit was the established fact that the Sallees understood the bank's interest was aligned with the seller – and not with them. Pet. App. B at 23a.

Second, the Sallees' assertion that the Sixth Circuit created a conflict within the circuits is outlandish. Here the Sixth Circuit was applying Kentucky law while the decision the Sallees suggest is conflicting, *Masi v. Ford City Bank and Trust Company,* 779 F.2d 397 (7th Cir. 1985), is a Seventh Circuit decision applying Illinois law. Clearly two circuits' application of two different states' laws to two different factual settings can create no conflict worthy of the requested writ. In *Masi*, under Illinois law, the bank was prohibited from exercising any right of set-off with funds deposited in a valid IRA account. When the bank did that in order to satisfy a loan guaranty, it breached a fiduciary duty. *Masi,* 779 F.2d at 397.[1] The Sixth Circuit's decision was based on the application of Kentucky law to the unchallenged factual findings of the trial court, facts not at all similar to *Masi*.

Finally, the basis for both of the Sallees' assertions is the alleged existence of an IRA. The Sallees claim that because an IRA was supposedly involved, under Kentucky law, a fiduciary duty must be found to exist. They cite no

[1] This proposition was so unremarkable that it was not appealed by either party. *Id.*

Kentucky case for that proposition. In any event, the Sixth Circuit found the damage remedy sought by the Sallees was rendered legally impossible by the Sallees themselves because they had previously destroyed the rollover status of Mr. Sallee's Employees' Stock Ownership Plan stock by twice assigning it as collateral to another bank, months before the loan at issue at FKNB. Thus under 26 U.S.C. § 402(c), no tax deferred IRA could have been created. The Sixth Circuit correctly held the predicate to the Sallees' damage argument was faulty and properly reversed damages on that separate basis.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the United States Court of Appeals to the Sixth Circuit should be denied.

Respectfully submitted,

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